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Commonwealth Oil & Gas Co Ltd v Mr Baxter and another [2009] CSIH 75

2 October 2009

Court of Session, Inner House (First Division)

Lord President (Hamilton), Lord Nimmo Smith and Lady Belcher

Lady Belcher

The issues

[1] This case is an appeal to the Inner House on a ruling by the Lord Ordinary, Lord Reed, in the Outer House. In that case, there were two questions to be considered. The first was whether Mr Baxter, who was a director and board member of the pursuer, Commonwealth Oil & Gas Co Ltd (COGCL), was in breach of his director's fiduciary duty when he diverted a valuable commercial opportunity to the second defender (Eurasia), a company of which Mr Baxter was also a director. The claim against Mr Baxter was that he should be held liable to account for any profits derived from the wrongly diverted commercial opportunity or, alternatively, he should be liable for the damage incurred by the pursuer, COGCL, arising out of his breach of duty. The second issue to be settled was a claim against Eurasia, where COGCL maintained that Eurasia had knowingly or dishonestly participated in Mr Baxter's breach of fiduciary duty, making Mr Baxter and Eurasia jointly and severally liable for the associated loss.
[2] The usual claim for the wrongful, undisclosed, taking of a business opportunity by a director is an accounting for the profits made by that director. The business opportunity in this case took the form of a time limited Memorandum of Understanding (MoU) between the State Oil Company of the Azerbaijan Republic (SOCAR) and Eurasia. The MoU expired without any profits being derived from it by Mr Baxter or by Eurasia. An accounting for profits would therefore lead to no award, even were the court to find in favour of the pursuer. In the circumstances, an accounting for profits claim was abandoned in favour of the alternative claim in damages.
[3] COGCL's argument was that if Mr Baxter had brought the opportunity to enter into the MoU to its attention, by informing Mr McBain as the executive director controlling COGCL's decisions, Mr McBain would have acted to ensure that COGCL pursued the commercial opportunity. Further, COGCL would have entered into the MoU with SOCAR, either on COGCL's own account or through the medium of a corporate vehicle incorporated for that purpose. Had COGCL entered into the MoU in this way, it was argued, there was a substantial chance that they would have successfully negotiated and secured a further agreement for the exploration and development of the Eurasia block. The measure of damages claimed was thus the profits COGCL could have made had Mr Baxter acted in accordance with his director's fiduciary duty.
[4] While, on the first issue, the Lord Ordinary concluded in the Outer House that Mr Baxter had indeed acted in breach of his fiduciary duty to COGCL, on the second issue, he ruled that Eurasia did not knowingly or dishonestly participate in that breach of duty and was not therefore under any liability to compensate COGCL. The case before us now is an appeal by Mr Baxter against that finding of a breach of duty (the first issue) and a cross-appeal by COGCL against the Lord Ordinary's finding of no knowing or dishonest participation by Eurasia (the second issue).

My finding on the second issue

[5] On the second issue, that is, the finding that Eurasia did not knowingly or dishonestly participate in that breach of duty, and was not therefore under any liability to compensate COGCL, I agree that -

for the reasons given by Lord Nimmo Smith and the Lord President - the cross-appeal must be refused. I have nothing further to add on that matter.

This opinion will thus relate only to the first issue, that is, whether or not Mr Baxter acted in breach of his fiduciary duty.

The facts

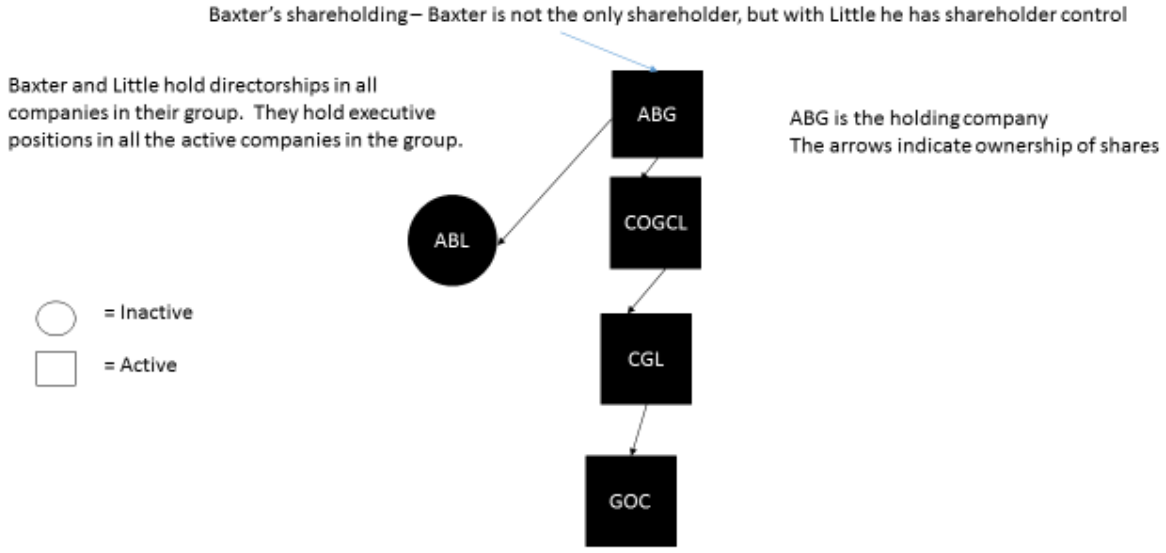
[6] The Lord Ordinary set out a detailed and helpful account of the complex facts of this case in the Outer House ([2007] CSOH 198). The facts involve four companies - ABG, COGCL, CGL, and COG - that grew from the earlier entrepreneurial activities of Mr Baxter's initial company, ABL; and also a company in the Vitol group that provided an injection of funding into Mr Baxter's group.
[7] Mr Baxter's story can in some ways be seen as a familiar one for the life cycle of an entrepreneurial company. I characterise that story as follows.
[8] A small company based on the skills and expertise of its founding individuals obtains a contract that requires large scale funding in order to be implemented. Funding is found by approaching a bigger organisation, but as a condition of the funding arrangement, ownership of the entrepreneurial firm is diluted and shareholder control by the founding individuals is lost, despite the value of their shareholdings increasing.
[9] From this point in the story, the bigger organisation may remove the entrepreneur from their management role, for instance their position as Managing Director (MD), Chief Executive Officer (CEO), Chief Operating Officer (COO), or whatever title has been adopted by the entrepreneur-leader of the company. In such a situation, the original founder of the company will then have valuable shareholdings but will no longer have an executive, management role in what was once their company. This was Mr Baxter's position at the crucial time.
[10] Under the powers obtained by the larger company in exchange for an injection of funds, it is not uncommon for the original founding executive director to lose his/her paid employment. I label this *forced exit,* whether the director resigns under the threat of removal or is actually removed. In such situations, the director's skill set is likely to mean that any new entrepreneurial activity (*income generation*) may involve working in competition with the first business. Further, should the entrepreneur wish to sell their shareholdings in the first enterprise, there may be more and less tax-efficient ways of doing so (*taxation strategy*). All three of these elements – *forced exit, income generation*, and *taxation strategy* – play a part in Mr Baxter's story. I use these three elements as a way of organising and summarising the relevant facts as distilled from the fullsome evidence as recorded by the Lord Ordinary [2007] CSOH 198.

Forced exit

[11] I have reduced the detailed account of the changing shareholdings and directorships of Mr Baxter and his group of companies to three diagrams. Diagram 1 shows the position immediately before the provision of extra funding, which was provided in the event by a company in the Vitol group. The round and square shapes in the diagrams represent companies in Mr Baxter's group built up from its earliest beginnings as Addison & Baxter Ltd (ABL), which was a private company incorporated in England and Wales in 1985, by Mr Baxter and Mr Jeremy Little.
[12] The larger organisation that provided much-needed funding to ABG, COGCL, CGL and GOV (four companies within the group that grew from Mr Baxter's earlier entrepreneurial activities with ABL) was the Vitol group – a privately-owned group of companies, primarily concerned in oil trading. The negotiation was conducted between Mr Baxter and Mr McBain, a consultant with Vitol Services Limited, a member of the Vitol group. The discussions with Mr McBain resulted in a funding

agreement which was implemented in two stages in May and July 2002. This resulted in the Vitol group obtaining a 62.83% shareholding in CGL, and a 42% shareholding in ABG.

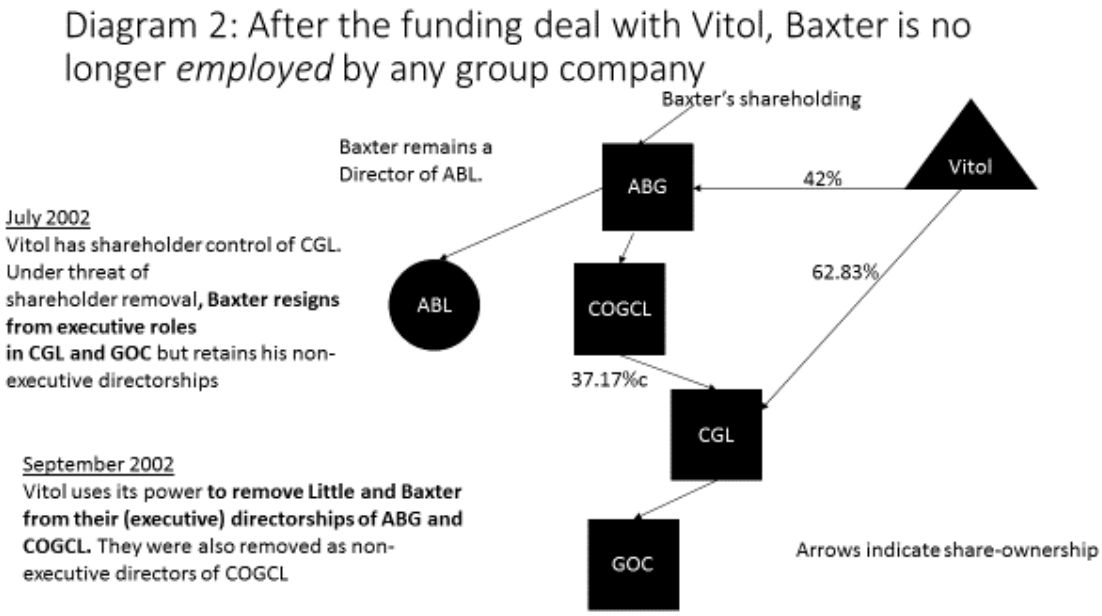
Diagram 1: Before extra funding sought from Vitol group



[13] Mr McBain made it clear that he wished to replace Mr Baxter and Mr Little in the "management and control" - first of CGL and GOC, and then of ABG and COGCL.
[14] Because Vitol owned 62.83% of the shares in CGL, which in turn owned 100% of the shares in GOC, the Vitol group could control board appointments and removals at both CGL and GOC. Through control of the make-up of these boards, Vitol could also control who was appointed to the role of CEO or equivalent. So, under the threat of being formally removed and replaced, in July 2002, Mr Baxter and Mr Little resigned from their positions as, respectively, the president and chairman of both CGL and GOC (see Diagram 2).
[15] In resigning as president, Mr Baxter gave up his executive, full-time, director's role and thus lost the position of "management and control" of CGL and GOC to Mr McBain.
[16] For the second part of Mr Baxter's *forced exit*, Mr McBain concentrated on removing Mr Baxter and Mr Little from their positions in ABG and COGCL. This was slightly more difficult because the Vitol group had obtained only a 42% shareholding in ABG. What Mr McBain *did* have, however, was the support of ABG's other directors, so that Vitol effectively controlled board decisions at ABG. Thus, Mr McBain could ask the ABG board to vote on a resolution to remove Mr Baxter and Mr Little from their executive jobs at ABG, and could ask the ABG board to vote on a resolution to use its position as 100% shareholder of COGCL to convene a shareholders' meeting of COGCL in order, in turn, to vote on the removal of Mr Baxter and Mr Little as directors of COGCL.
[17] This crucial Board meeting of ABG was held on 10 September 2002, followed by a shareholders' meeting of COGCL. Mr Baxter and Mr Little resigned from their remaining executive positions at ABG; and at the shareholders' meeting of COGCL, they also lost their directorships of COGCL.
[18] Thus, because of the need for new funding, and the conditions placed on obtaining it, Mr Baxter ultimately lost shareholder control of his companies, and then lost control as manifested in his powerful *executive director* roles.

Executive and Non-Executive Directors

[19] The Companies Act 1985 refers to directors without making any distinction between executive and non-executive roles. However, the distinction is significant in this case because executive directors are full-time employees of a company who hold the office of director. Non-executive directors are paid fees based on the time required for their part-time role rather than being remunerated as company employees. Therefore, it was only once Mr Baxter had been forced out of executive roles in his group of companies that he needed to generate income from another source. Further, it was largely due to taxation considerations that Mr Baxter was later re-appointed to the office director of COGCL, a non-executive role, which was remunerated by a fee but with no employment contract.
[20] UK companies routinely appoint directors to non-executive and executive roles. The basis upon which they do so is set out in the UK's Combined Code on Corporate Governance (the Code), which is periodically reviewed by the Financial Reporting Council (FRC). The role of a non-executive director is to contribute to corporate strategy formation and good governance. In the case before us, as will become apparent, the scope and application of directors' fiduciary duties to non-executive directors is at the heart of Mr Baxter's argument that he is not in breach.



[21] Diagram 2 shows the position after Mr Baxter had been replaced in his positions of "management and control". As of 10 September 2002, he was no longer employed by any of the group companies. He was neither an executive nor a non-executive director of COGCL, but he remained a non-executive director of ABG, CGL and GOC. He was a director of ABL throughout, but ABL had been inactive since it became a subsidiary of ABG, which acted as the holding company for the group. As an inactive subsidiary, ABL did not require any executive leadership. Thus, Baxter's directorship of ABL did not bring with it any relevant executive powers.

Income generation

[22] I now turn to the year ending 10 September 2003 – the first year after Mr Baxter's *forced exit*.
[23] By the time he was forced out of his executive positions, Mr Baxter's annual salary as chief operating officer of ABG had reached £118,500.

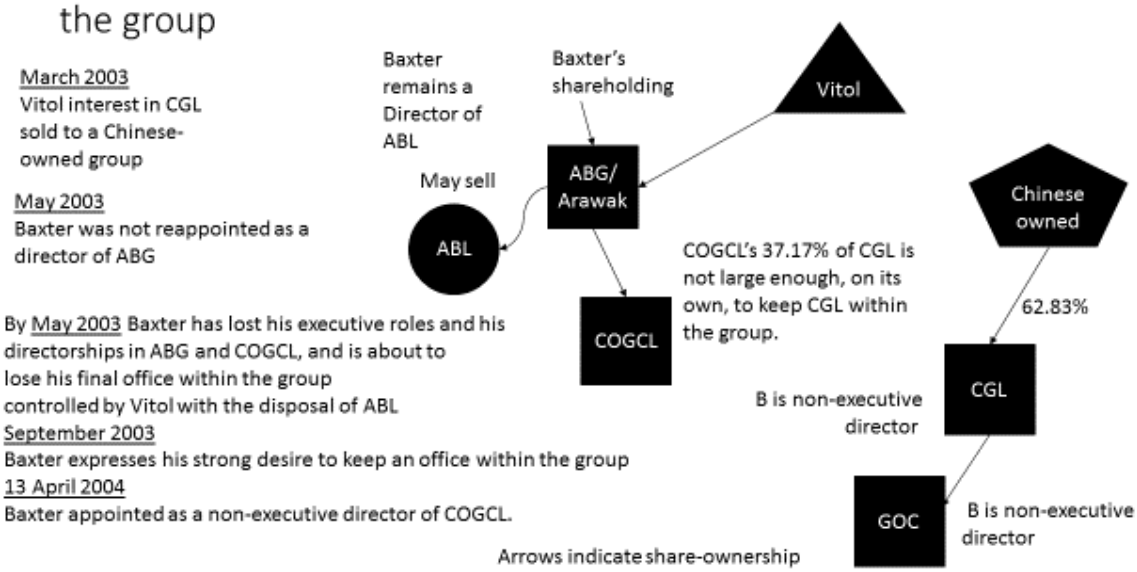
[24] At the crucial ABG Board meeting on 10 September 2002, it was agreed that he and Mr Little were each to receive a "termination" agreement and a "consultancy" agreement. The first consultancy agreement was executed on 13 December 2002, but backdated to be effective for the period from 11 September 2002 to 10 September 2003. Under this, Mr Baxter was to be paid US$125,000 for which he could be asked to work for up to 6 days per month. No reason was put forward for the switch in presentation from sterling to US dollars, but oil is usually priced in US dollars and I assume that this is the explanation. The consultancy agreement between the parties also included a "non-compete" clause, which referred to business carried on by the Company or any Group Company in Azerbaijan.
[25] By September 2003, the first consultancy agreement was about to expire. Mr Baxter had not been asked to do anything under it. At the end of September 2003, Mr McBain raised with Mr Baxter the possibility of renewing the agreement on the basis that the annual payment would be reduced to US$25,000. Mr Baxter replied that he would "rather do without the money than accept the non-compete restrictions" and that he "could not manage" on only US$25,000 ([2007] CSOH 198 at [57]). As a result, a second consultancy agreement was made for the year to September 2004 for US$25,000 but without the inclusion of a non-compete clause.
[26] Mr Baxter said in evidence to the Outer House that, once the second consultancy agreement had been signed (19 November 2003): "he saw no obstacle to his seeking out new oil and gas opportunities in Azerbaijan on behalf of a third party or on his own account" ([2007] CSOH 198 at [65]), and the Lord Ordinary accepted that that was indeed Mr Baxter's understanding.

Taxation strategy

[27] The applicable Capital Gains Tax (CGT) rules provided the basis of Mr Baxter's taxation strategy. To continue to qualify for taper relief in calculating the CGT payable on a future sale of his ABG shares (later renamed Arawak shares), that shareholding needed to remain a "business asset". For the shares to remain a business asset, Mr Baxter needed to be *employed* by an ABG (later Arawak) group company or to hold an *office* in a group company. Taper relief, if it remained available, could reduce Mr Baxter's CGT liability by hundreds of thousands of pounds.
[28] As already noted, by September 2002 Mr Baxter had lost his executive roles, and so was no longer an *employee* of any ABG group company. However, at that time, the shareholding qualified for CGT taper relief by virtue of the *offices* that Mr Baxter continued to hold as a non-executive director of ABL, ABG, CGL, and GOC.
[29] In January 2003, ABG announced that the Vitol group had entered into agreements for the sale of its 62.83% interest in CGL to two Chinese-controlled companies. When the Vitol group completed that transaction in March 2003, Mr Baxter retained his non-executive directorships of CGL and GOC, but those two companies ceased to be part of the ABG group.
[30] At ABG's annual general meeting held on 5 May 2003, Mr Baxter was not re-appointed as a non-executive director. Thus, as of May 2003, his only office in the ABG group was as a director of the original but now inactive group company, ABL. As illustrated by Diagram 3, this left him relying on his office of director of ABL to preserve his shares as "business assets", thus qualifying them for taper relief.
[31] By September 2003, ABG had been renamed Arawak; and ABL was under threat of being wound up or being sold off, possibly to Mr Baxter and Mr Little. Either outcome would result in Mr Baxter losing his sole directorship of a company in the Arawak group (formerly ABG). As a result, his Arawak shareholding would cease to be a business asset and he would lose access to CGT taper relief. On 9 September 2003, Mr Baxter wrote to Mr Little stating that qualifying for accelerated taper relief was "singularly the most important issue for me" ([2007] CSOH 198 para [56]). In pursuance of this, Mr

Baxter succeeded in persuading Mr McBain to have him, Mr Baxter, appointed as a non-executive director of COGCL on 13 April 2004 (see Diagram 3).

Diagram 3: Baxter likely to lose his only remaining *office* with the group



[32] A great deal of the evidence heard before the Lord Ordinary in the Outer House was concerned with the intentions of Mr Baxter and Mr McBain in taking and making (respectively) this appointment. It is clear that Mr Baxter's key business relationship with the State Oil Company of the Azerbaijan Republic (SOCAR) continued to be one that he hoped would generate income for him. He continued to tap into all possible sources of news about the oil and gas business in Azerbaijan and to spot opportunities. It is also clear that, as a non-executive director of a wholly-owned subsidiary (COGCL), Mr Baxter was not called to a single COGCL board meeting.

[33] On 7 December 2005, when Mr Baxter remained a member of the board of directors of COGCL, he succeeded in obtaining SOCAR's agreement to a MoU under which Eurasia (the second defender) was granted an exclusive right, for a period of twelve months, to negotiate with SOCAR on the terms of a possible further agreement relating to the exploration and development of an oil exploration block in Azerbaijan ('the Eurasia block').

[34] The question before us now concerns the scope and extent of the fiduciary duties owed by Mr Baxter to COGCL at the time of brokering that MoU, and whether - in facilitating the contract between SOCAR and Eurasia - Mr Baxter had breached any fiduciary duties to COGCL.

The law on Directors' Duties

[35] The law applicable to Mr Baxter between 13 April 2004, when he was re-appointed to the board of COGCL, and 7 December 2005, when the MoU was signed on behalf of Eurasia, was the common law as it then stood. Since then, the Companies Act 2006 has placed directors' duties on a statutory footing for the first time. I am mindful that this is one of the last cases that may require to be decided under the common law, but I am also conscious of the potential for this decision to have a lasting effect even when the new statutory framework is in force. This is because, in interpreting directors' duties under the Companies Act 2006, section 170(4) stipulates that:

> "… regard shall be had to the corresponding common law rules and equitable principles in interpreting and applying the general duties."

[36] I now turn to the applicable common law on directors' fiduciary duties.

Directors' Duties (the relationship between the director and the company)

[37] The law on directors' duties in relation to conflicts of interest is long-established. In 1851, in the case of *Aberdeen Railway Co v Blaikie Bros* (1854) 1 Macq 461, Lord Cranworth LC stated:

> " … it is *a rule of universal application* that no one having [a duty to promote the interests of the corporation] shall be allowed to enter into engagements in which he has *or can have* a personal interest conflicting or which *possibly may conflict* with the interests of those whom he is bound to protect" (1854) 1 Macq at 471 (emphasis added).

[38] That case concerned the validity of a contract made between Aberdeen Railway Company and Blaikie Bros. to supply metal parts used in railway construction. Mr Thomas Blaikie was a director and chairman of the railway company *and* the managing partner of Blaikie Bros at the time the contract was made. The contract in question required Mr Blaikie's involvement as a significant actor for both parties: the buyer (the railway company) and the seller (Blaikie Bros). For the railway company, his duty was to obtain a low price; and for Blaikie Bros, his duty was to obtain a high price. The House of Lords held that the contract was invalid.

[39] The rule in *Aberdeen Railway Co v Blaikie Bros* is one that proscribes engagements that carry conflicts of interest. But does this mean that no director can ever become a director of another company if the second company's interests may conflict with those of the first company?

[40] On this question, counsel for Mr Baxter submitted the authority of the decision in *London & Mashonaland Exploration Co Ltd v New Mashonaland Exploration Co Ltd (Mashonaland)* [1891] WN 165 - a single judge decision on an application for an injunction, and therefore a case of lower authority than *Aberdeen Railway Co v Blaikie Bros,* but cited with approval in the House of Lords by Lord Blanesburgh in *Bell v Lever Brothers* [1932] AC 161.

[41] In *Mashonaland*, the director in question was held to be "… at liberty to become a director even of a rival company, and, it not being established that he was making to the second company any disclosure of information obtained confidentially by him as a director of the first company, he could not at the instance of that company be restrained in his rival directorate" (per Lord Blanesburgh [1932] AC 161 at 195).

[42] In *Bell v Lever Brothers*, Lord Blanesburgh reconciled the duty to avoid conflicts of interest as expressed in *Aberdeen Railway Co v Blaikie* with the freedom to become a director of a rival company, expressed as the *Mashonaland* principle, by referring to two classes of contracts - a first class of contracts, where *Aberdeen Railway Co v Blaikie* applies, and a second class, described as "a director's own contracts with outsiders in which the company has no financial interest at all" [1932] AC 161 at 195, where the *Mashonaland* principle is applicable.

[43] The challenging nature of the *Mashonaland* principle was discussed by Sedley LJ in *In Plus Group Ltd and others v Pyke* [2002] 2 BCLC 201 where he concluded that:

> "… the *Mashonaland* principle is a very limited one. … I see no reason why the law should assume that any directorship is merely cosmetic. A directorship brings with it not only voting rights and emoluments but responsibilities of stewardship and honesty, and those who cannot discharge them should not become or remain directors" [2002] 2 BCLC 201 at 224-225.

[44] The director in *Mashonaland*, Lord Mayo, was willing to have his name associated with two rival companies. At the time of the interlocutory action he had done nothing more than that for either company. The companies had been incorporated with rival business aims but were not yet competing for contracts. Sedley LJ considered that not only was the *Mashonaland* principle limited to narrowly defined circumstances but that those circumstances were likely to be very short-lived:

> "If, for example, the two Mashonaland Exploration companies had been preparing to tender for the same contract, I doubt whether Lord Mayo's position would have been tenable, at

least in the absence of special arrangements to insulate either company from the conflict of his interests and duties…" (*Plus Group Ltd and others v Pyke* [2002] 2 BCLC 201 at 224).

[45] In order for the two companies to have put in place ways of managing Lord Mayo's conflict of interest, as imagined by Sedley LJ, each would need to have been informed of the directorship that Lord Mayo had accepted with the other company.

[46] It seems to me, in light of these authorities, that the first step in managing conflicts of interest is to declare those interests, and that such declarations are part of the fiduciary duty of loyalty. Millet LJ in *Bristol and West Building Society* [1998] Ch 1 stated:

> "The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person *without the informed consent of his principal*" [1998] Ch 1 at 18.

[47] When Mr Baxter accepted the appointment as a non-executive director of COGCL in April 2004, he was entering into a relationship with that company. Authorities reveal the relationship to be first and foremost one that demands the individual director's loyalty to the company.

Directors' Duties (as members of the board)

[48] It is now the norm in the UK for a company to have a unitary board comprised of executive and non-executive directors. For quoted companies, this is the model of governance set out in the Combined Code of Corporate Governance Code (the Code, FRC, 2003). This states: "Every company should be headed by an effective board, which is collectively responsible for the success of the company" (the Code, main principle A.1).

[49] Article 70 of the Table A articles of association, the default model adopted by many UK companies, states: "… the business of the company shall be managed by the directors who may exercise all the powers of the company" (the Companies (Tables A to F) Regulations 1985 (SI 1985/805)).

[50] The approach I have taken in this judgment is to take notice of the *collective* responsibility of the board of directors.

[51] The idea of the board of directors acting together as a body is present in Cranworth LC's universal rule laid down in *Aberdeen Railway Co v Blaikie Bros.* The full text of that rule opens with the words: "The directors *are a body* …" (1854) 1 Macq at p471.

[52] In making a board decision, by a formal vote or through arriving at an informal consensus, the directors are effectively saying "*we* have resolved … ". This is likely to follow a discussion where each individual director must bring their independent judgement to bear on the matter, but a board decision is, in the end, a collective decision. For an individual director who may be uncomfortable with a board decision, the choice is to accept it, and with it the collective responsibility for its consequences, or to resign from the board.

[53] The challenging nature of the collective responsibility of directors, at least in English company law, was noted in *Re Westmid Packing Services Ltd, Secretary of State for Trade and Industry v Griffiths*:

> "The collegiate or collective responsibility of the board of directors of a company is of fundamental importance to corporate governance under English company law. That collegiate or collective responsibility must however be based on individual responsibility. Each individual director owes duties to the company … to join with his co-directors …" [1998] 2 BCLC 646 at 653.

However, the difficulty with this idea of the board's collective responsibility is that there is currently no legal mechanism by which the board, as a body, can be brought before a court. Collective responsibility can only be enforced through expressing it as a set of individual duties.

[54] The quoted passage from *Re Westmid Packaging Services Ltd*, or some part of it, has been cited in at least eight subsequent director's disqualification cases. It is a new departure to consider collective responsibilities explicitly in a case such as this one but, if indeed the collective responsibility of the board of directors of a company is of *fundamental* importance, its feasibility and desirability is at least worthy of further examination.

[55] In my view, the board of directors is responsible *to* the company and it is responsible *for* its decisions. Philosophers have puzzled over what it means for collectives, that is, groups of people, to intend and then to act. A collective intention can be the same as the personal intention of one of its members, but it need not be. In other words, a board can decide to do something against the personal arguments and personal opinion of one of its members. Once the board has formed its intent, collective responsibility will mean the whole board is responsible for that intent, even if there is one member who did not individually form or support that intention.

[56] If this analysis of board collective responsibility is correct, it follows that becoming a member of a group (such as a board of directors) can bring with it individual responsibility for what I intend and do as a member of that group, and collective responsibility as a member of that group, for what the group intends and does.

[57] Appointment to membership of a board requires acknowledgment by the appointee of not only their individual relationship to the company and the individual responsibilities that brings, but also their membership of a body with collective responsibilities. To say I am a board member is to say I am responsible as an individual *and* we are responsible as a body. My understanding of Lord Woolf's statement in *Westmid Packing Services* is that it is thus an acknowledgment that the board, as a body, cannot be cited as the defender and so the only way in which collective responsibility can be tested in court is through an action naming an individual director.

[58] To say that a board member must work both as an individual saying "I am responsible" and relationally with other board members saying "we are responsible" may be conceptually complicated, but it is something done routinely in many boardrooms. Borrowing an expression from the legal and political theorist Jennifer Nedelsky, a director is regularly required to be a 'combination of individuality and 'enmeshedness', integrity and integration'.

[59] Traditionally, and in contemporary times, the registered company has been a form of business organisation that has enabled "self-made men" to realise their independent entrepreneurial ideas and grow their personal wealth. In his judgment, the Lord Ordinary noted that Mr Baxter and Mr McBain interacted as "… intelligent and astute businessmen" ([2007] CSOH 198 at [12]). In making this assertion, the Lord Ordinary, to my mind, underscores an understanding of the two men, each in a "businessman" role, acting as autonomous, bounded selves, and as "self-made men". One might say – drawing on influential strands of moral psychology - that this reflects the 'masculine side' of being a director in a commercial and organisational environment imbued with 'male' values. As Carol Gilligan has shown, such male values are "inexorable, unemotional and objective" and can be contrasted against "a feminine moral code based on caring and the maintenance of relationships and networks" (as cited in C. Smart, *Feminism and the Power of the Law* (London: Routledge, 1989), 73).

[60] But these atomistic conceptions of the 'self-made business man' may also be seen to disguise the more 'feminine' undercurrent of company structures, within which the relationality of the corporate board and the collective responsibilities that attend to directorship have remained, notwithstanding the law's difficulty in calling the board as a whole formally to account.

[61] I want to apply this thinking to Mr Baxter's board membership of COGCL in the case before us. Appointed on 13 April 2004, Mr Baxter became individually responsible for his contribution as a director of COGCL and became part of the body that was the company board. But what demands did Mr Baxter's role and responsibilities place on him in relation to COGCL's board? Lord Woolf, if I read him correctly, would say that because the board as a whole cannot be held to account for its responsibilities, an individual's duties include an obligation to join with fellow directors.
[62] We have heard that during the time period crucial for this case – that is, from 13 April 2004 to 7 December 2005 when the MoU was brokered by Mr Baxter - COGCL's board did not call any official meeting. But this fact in itself does not and cannot excuse Mr Baxter's alleged breach of duty, and nor does his status on that board as a non-executive, rather than executive, director.
[63] Indeed, if Mr Baxter wants to point to his role as non-executive, rather than executive, director, he might expect to be held to the corporate governance norms for non-executive directors, which include a role in providing constructive challenge and reminding executive directors of their obligation to meet as a board with sufficient regularity to discharge their duties effectively.
[64] This exploration of directors' collective duties is not strictly required for me to reach a decision in this case, but I have engaged with it here since it serves to highlight a matter of fundamental importance that has not previously been analysed in such detail.

Decision on the first ground of appeal

[65] Counsel for COGCL relied, before this court and before the Lord Ordinary in the Outer House, on authorities that express directors' fiduciary duties as rules of universal application, i.e. applicable in all circumstances and to all directors. If the fiduciary duty of loyalty is to be of universal application then it can be framed as follows: the law demands, first, that a director asks themselves whether something they plan to do in their own interest could possibly conflict with the company's interests and, second, when the answer is 'yes', it requires them to act in a way that acknowledges - and where necessary avoids - that conflict.
[66] Meanwhile, counsel for Mr Baxter has submitted authorities supporting the proposition that a director's own contracts, in which the company (in this case COGCL) had *no* financial interest, fall outside the scope of the authorities that speak of universal applicability. To apply the fiduciary duty of loyalty in accordance with this argument would involve determining whether the "conflict" question should be asked at all. We would need to ask first whether the particular director was in a position akin to Lord Mayo's in *Mashonaland.* If yes, then we need not ask the much more general question about the potential for a conflict of interests.
[67] I do not accept that the *Mashonaland* method for arriving at a conclusion of no breach of fiduciary duty is applicable to Mr Baxter's circumstances. His position in relation to COGCL cannot be seen as akin to the very narrowly defined position of Lord Mayo in that case. Indeed, the roles of all non-executive directors under the Code, as well as the FRC's guidance on the Code in its Higgs' Report, may mean that no director could ever again be appointed to a role as small as Lord Mayo's even for a very short period. I leave that matter for a future case. Here it is sufficient to say that when *Mashonaland* is applied to Mr Baxter's position it does not help him.
[68] Thus, I find Mr Baxter to have breached his fiduciary duty owed to COGCL. More specifically he has breached the "time-honoured" fiduciary duty of loyalty owed by a director to their company.
[69] In reaching this conclusion, I am applying the principle expounded by Millet LJ in *Bristol and West Building Society* [1998] Ch 1 at 18 that a fiduciary's duty of loyalty means that a director may not act for personal benefit or the benefit of a third person without the informed consent of that director's principal. Mr Baxter did not inform COGCL, much less obtain its informed consent, and so he fell short of the standards reasonably and appropriately expected in respect of company loyalty.

[70] A company is only able to give its informed consent to a director's involvement in a competing business in accordance with its constitution. If this is a matter left to "the directors" then the (potentially) wrongdoing director would need to inform the board, and the other directors would need to decide to consent. With informed consent in place, the director's conduct in pursuing an opportunity on behalf of a competing business would not be a breach of fiduciary duty. But Mr Baxter's actions in arranging for Eurasia to take the commercial opportunity without the informed consent of COGCL did certainly amount to such a breach of duty.

Reflective Statement

A Scottish judgment

As this is the Scottish Feminist Judgments Project, my first priority was to find a case where the litigation started and finished in Scotland. Secondly, I wanted to find a case with at least a hint that Scotland might choose to disagree with developments in company law coming from the English courts. Scots company law has its foundations in a single UK statute with very few provisions requiring different processes or procedures for the different UK jurisdictions. By choosing a case on appeal to the Inner House of the Court of Session, the rules of precedent permitted me latitude to either agree or disagree with rulings of the English Court of Appeal. *Commonwealth Oil & Gas Co Ltd v Mr Baxter and another* is a case where other judges in the Inner House raised the possibility of disagreeing with the English Court of Appeal. Although Lord President (Hamilton) did not express outright disagreement, he did state (obiter) at paragraph 14 that he was "… not to be taken as agreeing with the reasoning of the Court of Appeal" [2009] CSIH 75. My judgment did not, in the end, need to pursue this opening for an England/ Scotland divide.

Replacing a judge

The feminist judgments in this volume maintain the norms for the original court hearing the case. The Inner House of the Court of Session sits with three judges, or five for more difficult cases. In order to keep three judges on the bench I have replaced Lady Paton. I want to make it clear that this is solely because Lady Paton was the judge who said the least on this occasion.

Looking for feminist issues in Company Law

I was very eager to offer a judgment to this collection of Scottish feminist judgments, and to tackle a company law case. I have long believed that company law could benefit from feminist insights.[1] Those feminists who blame the oppression of women on systems of private property and capitalism may suggest that the best feminist approach to companies would be their elimination as a way of organising both production and work. My approach is to begin with the current existence of companies and to work from within companies and within company law.[2] My latest research in the field of company law and corporate governance has the directors as its main focus,[3] so I have chosen a case concerning a director's fiduciary duty, where I hoped to be able to explore two aspects of director's responsibilities using feminist ideas.

More specifically, I hoped to apply to the case some feminist ideas about the boundaries of group membership. Group membership is useful in forming categories for activist campaigning purposes,

[1] A Belcher (1997) "Gendered Company: Enterprise and Governance at the Institute of Directors", *Feminist Legal Studies* 5 (1) 57-76.

[2] I have held the office of non-executive director with at least one company from 2008 to date.

[3] A Belcher (2014) *Directors' Decisions and the Law*, (London and New York, Routledge).

for example by the women's movement; but it is also potentially problematic in re-enforcing differential treatment based on the categories of, for example, male and female.

My chosen case can be seen as emphasising the importance of the concept of group / community membership in a rather different environment – relating to membership of a board of company directors. I wanted to point out that taking on the identity of director necessarily comes hand in hand with taking up such membership. I wanted also to point out that current corporate governance norms divide directors into sub-categories of executive and non-executive, but in drawing distinctions between these two types, corporate governance may have drawn a boundary across the UK's unitary board. This is a boundary that I wanted to suggest may have played a part in the way that Mr Baxter appears to have forgotten the need to maintain board relationships. Jennifer Nedelsky claims that "… the boundary metaphor consistently inhibits our capacity to focus on the relationships it is in fact structuring."[4] I wanted to try to bring this insight to bear in respect of directors' duties. I also hoped to encourage directors actively to *remember* their identity as *director,* and everything that it entails, as they take up membership of a board because, as Derrida expresses it: "what is recalled to memory calls one to responsibility".[5]

A second area where I felt that directors' responsibilities might usefully be subjected to feminist re-thinking is in relation to the co-existence of a director's individual responsibility alongside the board of directors' collective responsibility. I follow Lord Woolf's method for operationalising collective responsibility, which has no enforcement mechanism, in terms of an individual responsibility to join with fellow directors. Directors need to be autonomous individuals able to make decisions by exercising independent judgement. However, they also need to be board members and take collective responsibility for the board decisions that are made. As I note in my judgment, feminist scholar Jennifer Nedelsky sees the human being as a 'combination of individuality and 'enmeshedness,' integrity and integration.'[6] The limited liability company has been a vehicle for autonomous (rational) investment decisions. Small entrepreneurial companies have also been used by many "self-made men" as a way of organising their businesses and growing *their* individual wealth. However, the company is a statutory construct that demands the exertions of board members as *both* autonomous selves *and* as social selves in collective decision-making and collective responsibility. Thus, board decisions reflect inevitably a form of "we-intention".[7]

More than twenty years ago, I investigated the registered company form, conceptualising it by way of attributes that have historically been categorised as stereotypically male and female.[8] At that time, essentialist feminism opened up a way to think about a proposed reform of company law in terms of a feminising of that law. In this feminist judgment my vision is of every company board as a body that requires its parts to function well *in relation* to each other. I can arrive at that ideal either by relying on an essentialist view of the female as good at caring and relating,[9] or by relying on

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[4] J Nedelsky (1990) "Law, Boundaries and the Bounded Self", *Representations,* 30, spring, 162-189 at 171.

[5] As cited in Genevieve Lloyd "Individuals, responsibility, and the philosophical imagination" pp 112 -123 in, Mackenzie, C. and Stoljar, N.; *Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the Social Self* Oxford University Press, 2000.

[6] J Nedelsky (1990) "Law, Boundaries and the Bounded Self", *Representations,* 30, spring, 162-189

[7] Tuomela, R. (2005). We-Intentions Revisited. *Philosophical Studies, 125*(3), 327-369.

[8] A Belcher (1997) *op cit.*

[9] Such as that offered in C Gilligan, (1982) *In a Different Voice: Psychological Theory and Women's Development*, Harvard University Press.

Nedelsky's ideas that deliberately turn away from the drawing of boundaries, e.g. between the male and the female, and instead focus on a necessary, relational enmeshedness.

A lengthy judgement converted to a narrative judgment

The difficulties associated with attempting to write a Scottish feminist company law judgment are not simply that the feminist issues may not be obvious, and that Scottish company law is rarely different from the company law of England and Wales. There is also the problem of length. Company law cases are usually factually complicated and multi-faceted, often giving rise to very lengthy judgments. The Lord Ordinary's judgment in this case - in the Outer House of the Court of Session - uses 25,686 words to set out the facts. Meanwhile, Lord Nimmo Smith's "summary of the *essential* facts" in the Inner House runs to 6,224 words. For current purposes, I needed to provide a more concise account. I could not simply thank Lord Nimmo Smith for doing that job for me, as did Lord President (Hamilton) in the original Inner House hearing. Instead, my approach has been to include diagrams to explain relevant changes in shareholdings and directorships, noting how Mr Baxter's roles changed. Whilst the diagrams were not prompted by a feminist theory, I hope they prove helpful to the reader, making the judgment more accessible, which is itself a feminist or at least a democractising approach to judgment writing.

I have also written my account of the facts in a much more narrative style than the accounts given by any of the other judges in the original case. This is in line with the connection currently being made between feminist research and "narrative process".[10] Woodiwiss, Smith, and Lockwood's edited volume of 2017 has gathered together work that explores "some of the opportunities and challenges of doing research that is at the same time both feminist and narrative."[11] In claiming my version of the facts as part of "narrative" research, I am going beyond the conventional understanding of narrative research as focusing on the analysis of interviews and related documents. My method could be seen as either an analysis of the document that is the Lord Ordinary's account of the factual evidence taken at first instance, or it could be framed as an analysis of the "interviews" conducted by that court as each witness gave evidence. Miller explains her narrative research as having an "individual transition" as its focus, and for me that transition is the one that is made by a founding, entrepreneurial company director when the requirements of their business for extra funding cause them to lose their job. Miller also says that her approach involves paying attention to the "temporal ordering of events" associated with such an individual transition so that it can be "understood and can be narrated."[12] I hope that my narrative account of the facts produces that link between narration and understanding more fully than the original decision.

Finally, this was always intended to be a judgment that came to the same conclusion as the court – it is not a dissenting judgement. The *outcome* is not different but the presentation of the facts and the way in which the decision is reasoned are. In this sense, it marks a feminist journey more than a particularly feminist destination, but the way in which this more relational approach to company law, and to directors' duties in particular, might shift thinking in other cases, provoking alternative outcomes, is yet to be charted in Scotland.

[10] Miller T. (2017) "Doing Narrative Research? Thinking Through the Narrative Process". In: Woodiwiss J., Smith K., Lockwood K. (eds) *Feminist Narrative Research*. Palgrave Macmillan, London pp 39-63.
[11] Woodiwiss, Smith, and Lockwood, (2017) *op cit*, p1, 2.
[12] Miller (2017) *op cit*, p 42.